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Attorneys for Plaintiffs and the Class

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL MCGINNIS and
CYNDY BOULTON, individually,
and on behalf of all others similarly
situated;

Plaintiffs,

v.

COMMUNITY.COM, INC.;

Defendant.

Civil Case No.: 2:23-cv-02426-SB-JPR

**JOINT FED. R. CIV. P. RULE 26(f)
REPORT**

- Orig. Compl. Filed: 3/31/23
- Not Removed
- Resp. to Compl. due: 7/17/23
- Trial (Proposed): 1/13/25
- MSC: 7/21/23

1 Plaintiff Cyndy Boulton, on behalf of herself and all others similarly situated
2 (collectively, “Plaintiff”), together with Defendant Community.com, Inc.
3 (“Community” or “Defendant”) (collectively, the “Parties”) respectfully submit the
4 following Joint Fed. R. Civ. P. Rule 26(f) Report, pursuant to the Federal Rules of
5 Civil Procedure, Central District of California Local Rules, and the Court’s
6 Mandatory Scheduling Conference (MSC) Order, stating as follows:

7 **1. SUBJECT MATTER JURISDICTION**

8 **Plaintiffs’ Position**

9 The Court has jurisdiction of this matter under 28 U.S.C. § 1332(d)
10 (“CAFA”) because the amount in controversy exceeds \$5,000,000.00 and there is
11 at least minimal diversity.

12 **Jurisdiction for Plaintiff McGinnis’s Claims:** Defendant’s counsel has
13 provided evidence that Plaintiff McGinnis appears to have signed up for and
14 agreed to use Community’s services, including acceptance of Community’s Terms
15 of Use. Those Terms of Use contain an arbitration agreement, which, if valid,
16 would mean that Plaintiff McGinnis cannot proceed before this Court for his
17 claims made in this lawsuit. Plaintiffs’ counsel acknowledges the significance of
18 that evidence and do not intend to continue prosecuting the action on McGinnis’s
19 behalf. Plaintiffs’ counsel has attempted to communicate with Plaintiff McGinnis
20 following receipt of that information but have not been able to reach him despite
21 numerous requests.

22 The Parties have agreed to request a 30-day stay of McGinnis’s claims so
23 that Plaintiffs’ counsel can continue to attempt to reach McGinnis and if they
24 cannot reach him, to file a motion to withdraw that complies with all notice
25 requirements. The stipulation to stay McGinnis’s claims will be on file before the
26 Case Management Conference. In that stipulation, the parties will further ask the
27 Court to include in its order a requirement that McGinnis file an appearance within
28 14 days of the date of the Order or he will be dismissed from the action along with

1 a requirement that Plaintiffs' counsel serve the Order on McGinnis within two days
2 of the issuance of the Order and file proof of service with the Court.

3 The Parties agree that this approach will avoid the need to burden the Court
4 and Community with a motion to compel arbitration unless and until McGinnis
5 indicates that he plans to prosecute the action despite withdrawal of his counsel.

6 **Defendant's Position**

7 **Lack of Subject Matter Jurisdiction.** This Court lacks subject matter
8 jurisdiction over this action because Plaintiff's bare alleged violations of CIPA and
9 ECPA are insufficient to confer Article III standing. Plaintiff Cyndy Boulton has
10 alleged only a bare statutory violation without even identifying the content of her
11 alleged text to Community Leader LL Cool J's Community Number, much less
12 any sensitive information included in that text. As the Court held recently in
13 dismissing similar wiretap claims, this is plainly insufficient. *Byars v. Sterling*
14 *Jewelers, Inc.*, No. 5:22-cv-01456-SB-SP, 2023 WL 2996686, at *2-4 (C.D. Cal.
15 Apr. 5, 2023) (Blumenfeld, J.) (dismissing complaint for lack of subject matter
16 jurisdiction because the complaint did not "identify any specific personal
17 information" in the messages at issue that could possibly "implicate[] any harm to
18 [plaintiffs'] privacy").

19 **2. STATEMENT OF THE CASE: A short synopsis of the main** 20 **claims, counterclaims, affirmative defenses, and procedural** 21 **history**

22 **Procedural history**

23 Plaintiffs filed an initial Complaint on March 31, 2023, alleging violations of
24 CIPA sections 631, 632, and 632.7 and of the federal Wiretap Act section 2511(1)(a)
25 ECPA.

1 On May 12, 2023, the Parties entered into a Stipulation Extending Time to
 2 Respond to Initial Complaint. On May 15, 2023, the Court entered an Order Granting
 3 Stipulation Extending Time to Respond to Initial Complaint stating the following:

4 Based on the Stipulation to Extend Defendant's Time to Respond to Initial
 5 Complaint, Dkt. No. 23, **IT IS HEREBY ORDERED** that
 6 Community.com, Inc. will respond to the Complaint on or before July 17,
 2023.

7 The extension request appears excessive. Nevertheless, the Court will grant
 8 it with a reminder that the pretrial and trial deadlines will be based on *the*
 9 *original response date* (May 16, 2023), so the parties should be prepared to
 10 move quickly and diligently. The Court also notes that it expects any
 11 arbitration issues to be resolved promptly. The parties are ordered to
 12 reproduce this paragraph in full in their Rule 26(f) status report.

11 **Plaintiffs' Statement**

12 Plaintiffs allege that Defendant Community.com's business practices violate
 13 federal and state wiretapping laws. Plaintiffs allege that Defendant intercepts, logs,
 14 and reads text communications sent by Plaintiffs to various celebrities, *inter alia*,
 15 Rita Wilson and LL Cool J. Specifically, when persons, such as Plaintiffs, send a
 16 text message to one of the celebrities on Defendant's platform, Defendant hijacks
 17 that message and prevents it from ever reaching the intended recipient's device,
 18 unless and until the sender signs up for Defendant's services. Community then
 19 accesses these hijacked messages. These practices take place after Plaintiffs have
 20 been lured to send personal messages to numbers held out to be those celebrities'
 21 personal cell phone numbers. Importantly, the intercept and other violations all
 22 occur prior to Plaintiffs ever having occasion to be aware (either actually or
 23 constructively) of Defendant's behavior. Defendant's conduct violates three
 24 separate provisions of California's wiretapping statute ("CIPA"), along with one
 25 provision of CIPA's federal analogue, the Electronic Communications Privacy Act
 26 ("ECPA").
 27
 28

1 **Defendant's Statement**

2 This is plaintiffs' counsel's second attempt to paint Community as an
3 eavesdropper or wiretapper. In their first attempt, *Adler et al. v. Community.com*, the
4 Court dismissed plaintiffs' CIPA section 631 and ECPA claims without leave to
5 amend, but allowing claims for violation of CIPA sections 632 and 637.7 to survive
6 the pleadings state. (*Adler et al v. Community.com*, No. 2:21-cv-02416-SB-JPR, 2021
7 WL 4805435 (C.D. Cal. Aug. 2, 2021).) Thereafter, plaintiffs dismissed all of their
8 claims with prejudice.

9 Almost 18 months later, plaintiffs' counsel are back, filing a complaint on
10 behalf of different plaintiffs, Michael McGinnis and Cyndy Boulton, alleging identical
11 claims based on the similar allegations as in *Adler*. Intervening law since the Parties'
12 briefing and the Court's ruling on the motion to dismiss in *Adler* has further
13 undermined Plaintiffs' claims. For example, the Supreme Court issued its ruling in
14 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), holding a statutory violation
15 does not create Article III standing. And since this Court issued its ruling in *Adler*,
16 numerous courts have analyzed CIPA and ECPA claims like those asserted in this
17 action and have dismissed those claims on a variety of grounds not considered by the
18 Court in ruling on the *Adler* motion to dismiss.

19 Boulton has agreed to dismiss her CIPA section 631 and ECPA claims without
20 leave to amend on the grounds that the Court dismissed those claims in *Adler*.
21 Community does not oppose the request, but expressly preserves in this action all
22 arguments it made in its motion to dismiss the *Adler* complaint. The parties filed a
23 stipulation reflecting their agreement for the Court's consideration concurrently with
24 this Joint Statement.

25 Boulton's remaining claims fail for reasons not reached by the Court in *Adler*.
26 As discussed above, Boulton lacks standing to bring her remaining claims. In
27 addition, those claims suffer from numerous defects, including: for CIPA section 632,
28 electronic communications like texts are not "confidential communications" and

Community's platform is a software application, not a "device;" and for CIPA section 637.7, Community does not "intercept" communications in transit and Community is not a cellular or landline telephone as required under this section.

3. DAMAGES / INSURANCE

a. Realistic Range of Provable Damages

Plaintiffs' Position

Discovery is only now commencing, but each violation of CIPA is punishable through a statutory penalty of \$5,000.00, and each violation of the ECPA is punishable by \$10,000 in statutory damages. Damages will be calculated by ascertaining the number of inbound text messages and multiplying that number of total messages by the applicable statutory penalty.

Defendant's Position

Community disputes that Boulton is entitled to any damages as she cannot prove her individual claims for violation of statutes that do not apply to Community's technology and role as a service provider. In addition, Boulton will not be able to meet her burden to certify any class.

b. Insurance

Plaintiffs' Position

Not applicable.

Defendant's Position

Defendant is not currently aware of an insurance policy that provides coverage for this matter.

4. PARTIES, EVIDENCE, ETC.: A list of parties, percipient witnesses, and key documents on the main issues in the case. For conflict purposes, corporate parties must identify all subsidiaries, parents, and affiliates.

Parties: Plaintiffs, Michael McGinnis and Cyndy Boulton, and Community.

1 **Plaintiffs' Position on Percipient Witnesses and Key Documents**

2 Plaintiffs have not yet served their first set of discovery requests on
 3 Defendant given the procedural posture of the case, including Defendant's plan to
 4 seek dismissal based on the threshold standing requirement. Plaintiffs anticipate
 5 ascertaining the nature of Defendant's platform as it relates to Plaintiffs'
 6 allegations through written discovery and will seek to depose various witnesses
 7 within Defendant's corporate hierarchy, including a 30(b)(6) witness at the
 8 appropriate time and technical witnesses responsible for developing and operating
 9 Defendant's software. Plaintiffs will also seek the depositions of some of
 10 Defendant's clients, as Defendant claims it was acting with those clients' consent
 11 when engaging in the conduct alleged here. Relatedly, Plaintiffs may ultimately
 12 seek to add additional parties if there seems to be liability under the aiding/abetting
 13 provisions of the pending claims.

14 **Defendant's Position on Percipient Witnesses and Key Documents**

15 Key witnesses who may have relevant knowledge regarding Boulton's claims
 16 and Community's defenses, include: a) Boulton; and b) Community personnel who
 17 can testify regarding the Community platform and technology as it pertains to any
 18 claim(s) remaining in the case after the Court rules on the pending motion to
 19 dismiss, and Community's terms and conditions for Community Leaders.

20 If the complaint survives Community's motion to dismiss for lack of subject
 21 matter jurisdiction and failure to state a claim, the categories of documents relevant
 22 to Boulton's claims include documents related to reasonable expectations of
 23 whether text messages to LL Cool J would be facilitated by technology, consent to
 24 the technology facilitating Plaintiff's communications to LL Cool J; and platform
 25 technology related to the elements of any remaining claim(s).

26 **Subsidiaries, parents and affiliates:** Community is a privately held company
 27 with no parent company, subsidiaries, or affiliates. Salesforce, Inc. indirectly owns
 28 more than 10% of Community's outstanding stock.

1 **5. DISCOVERY**

2 ***a. Status of Discovery***

3 The Parties agree that discovery should begin once the Court rules on
4 Community's motion to dismiss for lack of subject matter jurisdiction and failure
5 to state a claim. Boulton will oppose Community's motion, but she acknowledges
6 that the challenge to the Court's subject matter jurisdiction raises a threshold issue
7 that should be decided before the Parties embark on discovery. In addition, as was
8 the case in *Adler*, the Parties anticipate that, at the least, the Court's ruling and
9 analysis will shape the contours of and scope of discovery.

10 Community's motion to dismiss will be filed on or before July 17, 2023, and
11 will be heard in mid-August, so the Parties expect that any delay in litigating the
12 case will be minimal.

13 ***b. Discovery Plan***

14 At this point, the Parties do not request any changes to the Federal Rules of
15 Procedure as they pertain to discovery. As discovery proceeds, Plaintiffs may seek
16 leave of Court for additional witness depositions exceeding the maximum number
17 provided by Rule 30.

18 **Plaintiffs' Position**

19 Plaintiffs anticipate requesting information, through depositions and written
20 discovery, on, among other things, the operation of Defendant's platform,
21 Defendant's contracts and relationships with its "Community Leaders," if, how,
22 and when Defendant accesses the texts at issue, and Defendant's business model.

23 **Defendant's Position**

24 Community expects that the Court will grant its motion and dismiss the
25 Complaint with prejudice. If the case goes forward, Community will request
26 information and documents regarding Boulton's texts to LL Cool J's Community
27 Number, her other interactions with LL Cool J, her view that she or anyone else
28 understood that sending a text to a celebrity who advertised his Community

1 Number to his 2 million followers would be delivered directly to the celebrity's
 2 phone without the use of a software platform, and any alleged harm she suffered as
 3 a result of sending two texts to LL Cool J.

4 **6. LEGAL ISSUES**

5 **Plaintiffs' Position**

6 The key legal issues in this case fall into two categories: (1) class
 7 certification issues pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3); and (2) legal
 8 issues relating to the alleged statutory violations. Specifically, these legal issues
 9 include whether and when Defendant intercepted, recorded, eavesdropped on, or
 10 accessed the communications sent from Plaintiff Boulton to LL Cool J, without the
 11 consent of all parties to the communication, and whether those text messages were
 12 confidential communications. The issues raised in Defendant's Rule 12(b)(6)
 13 motion will likely be litigated throughout this case.

14 Plaintiffs largely agree with Defendant's summation of the issues below,
 15 with the exception of d). The statute does not require the involvement of two
 16 cellular phones. Even if it somehow did, Defendant's platform is not the proper
 17 frame of reference for that analysis pursuant to CIPA § 632.7, as the
 18 communication at issue was being transmitted between two cellular telephones:
 19 Plaintiff Boulton's and LL Cool J's.

20 **Defendant's Position**

21 The key legal issues include whether: a) if McGinnis advises the Court and
 22 the parties that he intends to prosecute his claims, McGinnis should be required to
 23 arbitrate his claims in accordance with his agreement with Community if he is not
 24 dismissed from the action; b) Boulton has standing to pursue her claims; c) if the
 25 Court does not grant the Parties' stipulation regarding claims dismissed without
 26 leave to amend in *Adler*, Boulton's CIPA section 631 and ECPA claims fail for the
 27 same reason the Court already dismissed the identical claims with prejudice from
 28 the *Adler* action; d) Boulton's remaining claims fail to state a claim for reasons not

1 ruled on by the Court in *Adler*; e) Boulton’s texts to LL Cool J constituted
 2 confidential communications; f) it is objectively reasonable for Boulton to expect
 3 that her texts could get to LL Cool J without use of technology such as
 4 Community; g) Boulton consented to Community’s involvement in the
 5 communication to LL Cool J; h) Community’s software application is a “device”
 6 or a cellular radio telephone; i) Boulton can meet her burden to certify a class; and
 7 j) if so, she can prove her class claims on the merits, including whether she is
 8 entitled to any relief.

9 **7. MOTIONS**

10 ***a. Procedural Motions***

11 **Plaintiffs’ Position**

12 Per the discussion above, the Parties have stipulated to stay McGinnis’s
 13 claims to allow time for Plaintiffs’ counsel to continue trying to contact him and
 14 discuss whether he intends to continue prosecuting his claims. If Plaintiffs’
 15 counsel continue to be unable to contact him, they will file a motion to withdraw as
 16 counsel of record for Plaintiff Michael McGinnis at least seven days before the
 17 stipulated stay expires.

18 Subject to conferencing with Defendant, there may be a need to seek leave
 19 for additional witness depositions.

20 Subject to the aforementioned discovery, Plaintiffs may seek to amend the
 21 pleadings to add additional defendants.

22 **Defendant’s Position**

23 Community disputes that additional witness depositions beyond the
 24 applicable limits in the Federal Rules are needed. Community does not anticipate
 25 filing any procedural motions to add claims or parties or to transfer venue.

26 ***b. Dispositive Motions***

27 **Plaintiffs’ Position**

28 Either party may seek Rule 56 disposition of the claims.

Defendant's Position

On or before July 17, 2023, Community will file its motion to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). If any of Boulton's claims survive, Community may file a motion for summary judgment on Boulton's individual claims.

c. Class Certification Motion

The Parties propose the following class certification motion schedule:

- January 12, 2024: Plaintiffs file their class certification motion
- February 9, 2024: Community files its opposition
- March 1, 2024: Plaintiffs file their reply
- March 22, 2024: Oral argument on the motion

This schedule reflects the Court's requirement that plaintiff file the class certification motion within 120 days of the case management conference, plus six weeks to allow time for the ruling on Community's motion to dismiss before beginning discovery. It also reflects a slightly longer briefing schedule than the Court set in *Adler* to allow time for the Parties to depose experts who submit reports in support of the Parties' class certification briefs.

8. ALTERNATIVE DISPUTE RESOLUTION (ADR)

a. Prior Discussions

The Parties have had a very limited discussion under Rule 408.

b. ADR Selection

The Parties agree to engage in private mediation or a settlement conference, if and when they agree that settlement discussions might be fruitful.

9. TRIAL

a. Proposed Trial Date

The Parties agree on a January 13, 2025 trial date based on the guidelines specified in the Court's CMC Order and the schedule the Court set in *Adler*. The only changes to the *Adler* schedule are: 1) to allow for filing of summary judgment

1 motions after the close of expert discovery; and 2) to push the trial date from
 2 December 20, 2024 to January 2025 due to the holidays:

- 3 • March 22, 2024: Hearing on Class Certification Motion
- 4 • June 17, 2024 Initial Expert Disclosures
- 5 • July 19, 2024 Rebuttal Expert Disclosures
- 6 • July 19, 2024 Fact Discovery Cutoff
- 7 • August 16, 2024 Expert Discovery Cutoff
- 8 • August 16, 2024 Discovery Motion Hearing Deadline
- 9 • September 20, 2024 Non-Discovery Motion Hearing Deadline
- 10 • October 4, 2024 Settlement Conference/Mediation Deadline
- 11 • November 1, 2024 Trial Filings (1st Set)
- 12 • November 15, 2024 Trial Filings (2nd Set)
- 13 • December 6, 2024 Pre-Trial Conference
- 14 • January 13, 2025 Trial

15 ***b. Time Estimate***

16 **Plaintiffs' Position**

17 Based on the information presently available and subject to discovery,
 18 Plaintiffs anticipate a one-week jury trial.

19 **Defendant's Position**

20 Defendant estimates a one-day trial on Boulton's individual claims.

21 If there will be any trial on behalf of a class, Defendant agrees with
 22 Boulton's one-week estimate.

23 ***c. Jury or Court Trial***

24 Plaintiffs request and anticipate trial by jury.

25 ***d. Magistrate Judge***

26 The Parties do not consent to try the case before a Magistrate Judge.

27

28

1 *e. Trial Counsel*

2 **Plaintiffs:** Plaintiffs anticipate shared responsibilities at trial between
 3 Glapion Law Firm (Mr. Jeremy Glapion), Tousley Brain Stephens PLLC (Mr.
 4 Jason Dennett), and LippSmith LLP (Mr. Graham B. LippSmith, Ms. MaryBeth
 5 LippSmith, and Ms. Jaclyn L. Anderson). Additionally, Plaintiffs now designate
 6 Graham B. LippSmith as lead trial counsel.

7 **Defendant:** Defendant anticipates that Tiffany Cheung and Nancy Thomas
 8 will be co-lead trial counsel for Defendant, with support from Michael Burshteyn
 9 and Elizabeth Hutchinson.

10 **10. Special Requests / Other Issues**

11 The Parties do not believe that the Court should appoint an independent
 12 expert or master or that the procedures of the Manual for Complex Litigation
 13 should be used.

14 Dated: July 11, 2023

LIPPSMITH LLP

16 By: /s/ Jaclyn L. Anderson

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ATTESTATION

Pursuant to Civil L.R. 5-4.3.4, I, Jaclyn L. Anderson, as the ECF user under whose credentials this document is filed, attest that concurrence in the filing of this document has been obtained from each of the other signatories.

I declare under penalty of perjury under the laws of California and the United States of America that the foregoing is true and correct. Executed at Los Angeles, California this 11th day of July, 2023.

/s/ Jaclyn L. Anderson

JACLYN L. ANDERSON